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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ANGEL FRALEY, et al., individually and on behalf of all other similarly situated,

Plaintiffs,

v.

FACEBOOK, INC., et al.,

Defendants.

Case No. CV 11-01726 RS

OPPOSITION TO MOTION FOR POSTING OF APPEAL BOND

Date: February 13, 2014
Time: 1:30 p.m.
Department: 3
Judge: Hon. Richard Seeborg

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

OTHER AUTHORITIES

STATEMENT OF ISSUES

1. May a court impose a $32,000 appeal bond on class action objector-appellants based only on the fact that they have lost at the district court and some of them live out of state, and where the amount of the bond is based on costs for which the objector-appellants will not be responsible if they lose and the total amount sought from all objectors is 15 times the appellees' claimed costs?

2. Should the Court impose an appeal bond on an objector who is not appealing?

INTRODUCTION AND SUMMARY OF ARGUMENT

Class counsel's motion to impose an appeal bond on objector-appellants is extraordinary for both the amount requested and the breadth of the legal theory justifying the request.

The amount requested is impermissible in two respects: First, in contravention of the Ninth Circuit's decision in *Azizian v. Federated Department Stores, Inc.*, 499 F.3d 950 (9th Cir. 2007), class counsel seeks a bond for costs that no rule or statute entitles the appellees to recover. *Azizian* makes clear that taxable costs are limited to those provided by rule or statute, and that requiring an appeal bond for non-taxable costs is impermissible. Because there is no rule or statute authorizing a court to tax "settlement administrative expenses" or "delay damages" as costs, these costs are not a permissible component of an appeal bond. Second, although the purpose of a bond is to ensure that the appellee will be able to recover his costs, class counsel seeks to impose a bond for the full amount of the alleged costs on *each* appellant, for a total bond amount that is 15 times greater than the costs to which class counsel claims the plaintiff-appellees are entitled if they prevail.

Class counsel's asserted justifications for imposing a bond are both unpersuasive and overly broad. Class counsel avers that collection of costs will be difficult because some (but not all) of objector-appellants Schachter, Parsons, Leonard, Becker, and Carome (collectively, the "Schachter objector-appellants") reside out of state. The allegation of collection difficulty is unsupported and in fact incorrect; if there is an award of costs that appellants do not pay, there is a simple administrative procedure for domesticating the judgment in the states (New York, Tennessee and Virginia) in which the out-of-state Schachter objector-appellants reside. Class

counsel suggests that the merits of the appeal weigh in favor of a bond, but counsel has made no showing on this point other than that objector-appellants have been unsuccessful in this Court. The litigation histories and alleged motivations of *other* objectors in the same case are irrelevant to the merits of the arguments made by the Schachter objector-appellants. Class counsel's insinuation about a profit motive on the part of the Schachter objector-appellants is unsupported, particularly since the Schachter objector-appellants have already indicated that the lone issue they are pursuing on appeal pertains to the privacy protections for their minor children. Stripped of the innuendo regarding other objectors and profit motives, class counsel's theory of when an appeal bond may be imposed — that is, whenever an appellant has lost (the very definition of an appellant) and lives out-of-state — is of such breadth that it would make appeal bonds the rule rather than the exception, and numerous appeals would be chilled as a result.

There is no justification whatsoever (and class counsel advances none) for the imposition of an appeal bond on objector Reidel, who has not appealed.

Finally, in light of the magnitude of the bond class counsel seeks, class counsel's attempt to impose the amount of the asserted costs on *each* objector-appellant, and class counsel's unfounded allegations about the motives of the Schachter objector-appellants, this Court should be cognizant of the possibility that the purpose of the motion is not securing costs but intimidating objector-appellants from exercising their appellate rights.

For all of these reasons, class counsel's motion for an appeal bond should be denied.

BACKGROUND

A. The Underlying Class Action

Plaintiffs, members of the online social networking site Facebook, filed a class-action complaint against Facebook over its advertising program "Sponsored Stories," through which Facebook, without a member's consent, creates an advertisement that displays the member's name, likeness, or image in a manner that suggests the member endorses a Facebook sponsor.

This Court approved a settlement of the case on August 26, 2013, *see* Doc. 359, over the objections of the Schachter objector-appellants (along with objector Reidel), *see* Doc. 308, and those of a number of other objectors. As approved, the settlement consisted of a small monetary

award for class members who filed claims ($15), a cy pres award, and a set of changes to Facebook's policies. *See* Doc. 359, at 1. The Court also approved an award of fees to class counsel, in the amount of 25% of what remains of a $20 million settlement fund after the deduction of settlement expenses and between roughly $240,000 and $285,000 for costs and incentive awards, *see* Doc. 360 at 7 — for a total attorneys' fee award that is likely to be over $4 million and perhaps close to $5 million.

The main argument raised by the Schachter objector-appellants (along with objector Reidel) was that the terms of the settlement permit Facebook to violate the privacy laws of California, Florida, New York, Oklahoma, Tennessee, Virginia, and Wisconsin prohibiting the use of a minor's likeness for advertising without parental consent. *See* Doc. 308, at 9-14. Although the Court rejected this argument, it was the objection to which the Court devoted the most analysis among all the objections, including a discussion (but not a conclusion) regarding the possible preemptive effect of federal law and a discussion (ultimately dispositive) of whether the minors'-privacy objection required the Court to evaluate the merits of the underlying case. *See* Doc. 359, at 12-13.

The Schachter objector-appellants noticed their appeal on September 24, 2013, Doc. 372; objector Reidel did not appeal. In responding to the parties' requests regarding the ordering of transcripts on appeal, the Schachter objector-appellants indicated that they intend to pursue a single issue on appeal: "whether the fact that the class action settlement in this case permits violations of seven state laws should have defeated settlement approval." Doc. 409-1.

B. The Schachter Objector-Appellants

The Schachter objector-appellants and objector Reidel are all parents of minor children (or the children themselves, proceeding through their parents) who are members of Facebook and who have been notified they are members of the class or have had (or believe they have had) their images used for advertising without their consent or, in the case of minors, parental consent. *See* Doc. 308, Exs. 1-6 (Docs. 308-2 to -7). The Schachter objector-appellants and objector Reidel all reside in one of four states: California, New York, Tennessee, and Virginia. *Id.*

Specifically, the Schachter objector-appellants are John Schachter, on behalf of himself and his minor son S.M.S.; Kim Parsons, on behalf of herself and her minor daughter C.B.P.; Ann Leonard, on behalf of herself and her minor daughter D.Z.; the minor child R.P. (through her mother Margaret Becker); and the minor child J.C. (through his father Michael Carome). *See* Doc. 308, Exs. 1, 3-6. The minor child J.J.R. (through his mother Judy Reidel) also objected. *See* Doc. 308, Ex. 2. Facebook has created Sponsored Stories involving objector-appellants. For instance, Carome saw a Sponsored Story featuring his son J.C., Becker's daughter R.P. saw a Sponsored Story featuring herself, D.Z. saw a Sponsored Story featuring her mother Ann Leonard, and Parsons' daughter C.B.P. received email notification that she is a class member because Facebook has used her in one or more Sponsored Stories. *See* Doc. 308, Ex. 3 ¶ 7, Ex. 4 ¶ 8, Ex. 5 ¶ 7, Ex. 6 ¶ 7. The objector-appellant parents know that their children use the "Like" function and will continue to do so. *See* Doc. 308, Ex. 1 ¶ 13, Ex. 3 ¶ 13, Ex. 4 ¶ 13, Ex. 5 ¶ 11, Ex. 6 ¶ 11. All of the parents object to the use of their children's names, images, and/or likenesses without parental consent. *See* Doc. 308, Ex. 1 ¶ 6, Ex. 3 ¶ 6, Ex. 4 ¶ 6, Ex. 5 ¶ 6, Ex. 6 ¶ 6. All of the objector-appellants reside in states (California for Leonard and her daughter; New York for Becker and her daughter, Tennessee for Parsons and her daughter; and Virginia for Schachter and Carome and their respective sons) that prohibit the use of a minor's likeness without parental consent. *See* Cal. Civ. Code § 3344(a); N.Y. Civ. Rights Law § 50; Tenn. Code Ann. § 47-25-1105(a); Va. Code Ann. § 8.01-40(A). Through counsel, the Schachter objector-appellants presented argument at the Final Approval Hearing in support of their objections. Public Citizen Litigation Group represents the Schachter objector-appellants on a pro bono basis.

ARGUMENT

I. The Schachter Objector-Appellants Cannot Be Liable For Any Of The Expenses For Which A Bond Is Requested, So No Bond May Be Imposed Against The Schachter Objector-Appellants.

The purpose of an appeal bond is "to ensure payment of costs on appeal." Fed. R. App. P. 7; *accord Fleury v. Richemont N. Am., Inc.*, 2008 WL 4680033, at *6 (N.D. Cal. Oct. 21, 2008). Here, class counsel requests a bond of $32,000 (from each of 15 objectors) to cover two sets of alleged costs: the administrative expenses associated with settlement while the appeal is pending,

and transcript costs. Because no rule or statute provides that the Schachter objector-appellants can be liable for the former, and because the latter pertain only to other objectors' appeals, no bond may be imposed against the Schachter objector-appellants.

A. Objector-appellants cannot be required to post a bond for administrative expenses associated with a class settlement while an appeal is pending because these expenses are not taxable under a specific statute or rule.

In *Azizian v. Federated Department Stores, Inc.*, 499 F.3d 950 (9th Cir. 2007), the Ninth Circuit considered the propriety of imposing an appeal bond on a class action objector in the amount of opposing counsel's fees. *Id.* at 953-54. The court held that such a bond was improper, *id.* at 954, because the statute at issue did not authorize defendants to recover fees from unsuccessful plaintiffs, *id.* at 959, and "the term 'costs on appeal' in Rule 7 includes all expenses defined as 'costs' by an applicable fee-shifting statute," *id.* at 958. Thus, in the absence of an applicable cost-shifting statute or appellate rule, the Schachter objector-appellants are responsible only for normal "costs" under Rule 39, which covers "(1) the preparation and transmission of the record, (2) the reporter's transcript, if needed to determine the appeal, (3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and (4) the fee for filing the notice of appeal." Fed. R. App. P. 39(e). The Ninth Circuit's approach to defining "costs" on appeal is consistent with the Supreme Court's repeated admonition that the term "costs" is not an open-ended invitation for courts to impose whatever expenses they deem fair, but rather a term of art whose content is bounded by the items specified in statutes or rules. *See Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 297 (2006) (holding that, in the Individuals with Disabilities Education Act, "[t]he use of this term of art [i.e., 'costs'], rather than a term such as 'expenses,' strongly suggests that [the statute's cost-shifting provision] was not meant to be an open-ended provision that makes participating States liable for all expenses incurred by prevailing [plaintiffs]"); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441-42 (1987) (holding that "costs" as defined in Federal Rule of Civil Procedure 54 are limited to those specified by statute).

Class counsel's failure to identify a rule or statute that would render objector-appellants responsible for settlement administration costs is dispositive of the question whether a bond may

be required for these costs. Under *Azizian*, a bond cannot be imposed for costs that cannot be taxed against appellants if they lose on appeal, 499 F.3d at 959, and costs beyond those under Rules 38 and 39 cannot be taxed absent statutory authority, *id.* at 958.

Class counsel concedes (as he must) that "the Ninth Circuit has held that 'costs other than those identified in FRAP 39 can qualify as 'costs' for purposes of Rule 7 if they are so defined by some positive law, such as a fee-shifting statute.'" Doc. 435, Mot. for Posting of Appeal Bond (hereinafter "Mot.") 20 (quoting *Fleury*, 2008 WL 4680033, at *8, which in turn cites *Azizian*, 499 F.3d at 958); *see also* Mot. 21-22 (citing *Azizian*, 499 F.3d at 958, as "holding that the Court may include such expenses in the appeal bond if an applicable rule or statute defines them as 'costs'"). Yet class counsel identifies no rule or statute authorizing the imposition of settlement administrative costs or other damages resulting from delay while an appeal is pending.

Instead, class counsel cites a handful of non-precedential district court opinions imposing bonds to cover settlement administration costs. *See* Mot. 22-25. But these cases did not consider the effect of *Azizian* on the propriety of awarding administrative expenses. For instance, *Dennings v. Clearwire Corp.*, 928 F. Supp. 2d 1270 (W.D. Wash. 2013), did not cite *Azizian* at all, much less explain how a bond including administrative expenses is permissible under *Azizian*. In *Miletak v. Allstate Insurance Co.*, 2012 WL 3686785 (N.D. Cal. Aug. 27, 2012), the court's entire discussion of administrative costs consisted of one sentence ("However, the Court finds that it may only award an appeal bond comprising the first and third of these items — namely, appellate costs and administrative costs."), along with a footnote characterizing such costs as "reasonable." *Id.* at *2 & n.5. *In re Netflix Privacy Litigation*, 2013 WL 6173772 (N.D. Cal. Nov. 25, 2013), discussed *Azizian* in rejecting "delay damages" but then agreed to include administrative expenses in appeal bond without identifying a rule or statute authorizing the taxing of administrative expenses as "costs"; the court's one-sentence rationale relied only on a re-labeling of "delay damages" as "administrative costs": "Plaintiffs do not seek a bond for *delay damages* or attorneys' fees, but rather for the *administrative costs incurred during the delay* of settlement." *Id.* at *4 (emphasis added).

Class counsel's discussion of *Schulken v. Washington Mutual Bank*, 2013 WL 1345716

(N.D. Cal. Apr. 2, 2013), is misleading. Class counsel notes that part of the court's reason for not including administrative expenses in that case was plaintiffs' failure to justify their specific estimate of costs, Mot. 24, but class counsel omits the fact that *Schulken* also relied on plaintiffs' failure to identify a statute authorizing taxing such expenses as costs. *Id.* at *8. *Schulken* also criticized *Miletak* because it "did not identify any fee-shifting statute authorizing administrative expenses as 'costs,' but nonetheless interpreted such expenses as falling within the meaning of 'costs' in Rule 7." *Id.* at *7. The remainder of class counsel's authorities, *see* Mot. 23, pre-date the Ninth Circuit's decision in *Azizian*. *See Fleury*, 2008 WL 4680033, at *9 (refusing to rely on pre-*Azizian* case law); *accord Schulken*, 2013 WL 1345716, at *7.

Class counsel does not mention that many recent district court opinions — including some of the cases that class counsel himself relies on elsewhere in his motion — hold that appeal bonds may *not* include settlement administration costs or delay damages. *See In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Products Liab. Litig.*, 2013 WL 5775118, at *3 (C.D. Cal. Oct. 21, 2013); *In re Bayer Corp. Combination Aspirin Products Mktg. & Sales Practices Litig.*, 2013 WL 4735641, at *4 (E.D.N.Y. Sept. 3, 2013); *In re Navistar Diesel Engine Prods. Liab. Litig.*, 2013 WL 4052673, at *2 (N.D. Ill. Aug. 12, 2013); *Schulken*, 2013 WL 1345716, at *7-*8; *Embry v. ACER Am. Corp.*, 2012 WL 2055030, at *2 (N.D. Cal. June 5, 2012); *In re Initial Pub. Offering Sec. Litig.*, 728 F. Supp. 2d 289, 296-97 (S.D.N.Y. 2010); *In re Currency Conversion Fee Antitrust Litig.*, 2010 WL 1253741, at *3 (S.D.N.Y. Mar. 5, 2010); *Fleury*, 2008 WL 4680033, at *8; *In re AOL Time Warner, Inc., Sec. & "ERISA" Litig.*, 2007 WL 2741033, at *4 (S.D.N.Y. Sept. 20, 2007).

In contrast to class counsel's authorities, the district court decisions within the Ninth Circuit *rejecting* settlement administration expenses or delay damages *do* apply *Azizian*. *See Toyota Motor Corp.*, 2013 WL 5775118, at *3 (C.D. Cal.) ("[A]pplication of *Azizian* in this case precludes inclusion of increased settlement administration costs in the amount of a bond imposed on appeal."); *Schulken*, 2013 WL 1345716, at *7-*8 (N.D. Cal.) (discussing *Azizian* and refusing to include settlement administration expenses in bond amount because, among other reasons, "Plaintiffs-Appellees were unable to identify any additional precedent or statutes authorizing

administrative expenses as 'costs'"); *Fleury*, 2008 WL 4680033, at *8 (N.D. Cal.) (rejecting "delay damages" because, under *Azizian*, "F.R.A.P. 7 authorizes a bond only to cover 'costs' on appeal as expressly defined by rule or statute" and plaintiffs "have cited no statute or rule defining such delay damages as 'costs'"); *see also Embry*, 2012 WL 2055030, at *2 & n.9 (N.D. Cal.) (rejecting "delay damages" in reliance on *Fleury*, which in turn relied on *Azizian*). Because they rely on the Ninth Circuit's authoritative guidance in *Azizian*, the decisions refusing to include settlement administration expenses or delay damages in appeal bonds are more persuasive than class counsel's authorities that predate or ignore *Azizian*.

The Fifth Circuit has also refused to permit a bond to include expenses allegedly attributable to settlement delay where, as here, a settlement does not explicitly provide for pre-judgment interest. In *Vaughn v. American Honda Motor Co.*, 507 F.3d 295 (5th Cir. 2007), the court reduced a $150,000 bond to $1000, holding that "provid[ing] security for the detrimental impact of an appeal as to the entire class" did not justify the exorbitant bond. *Id.* at 298 (citation and internal quotation marks omitted). Rather, "the costs of delay are adequately captured by the settlement. The settlement agreement makes no provision for the payment of pre-judgment interest on the benefits Honda has agreed to pay, and the settlement does not become effective, by its terms, until any appeals are concluded." *Id.* at 299. Likewise, in this case, neither the monetary nor injunctive relief under the settlement agreement goes into effect until the "Final Settlement Date," *see* Doc. 235-1, §§ 2.1, 2.3(d), 2.4(b), which is defined as two court days after "the date on which all appeals [from the order approving the settlement], including but not limited to petitions for rehearing or reargument, petitions for rehearing en banc, and petitions for certiorari or any other form of review, have been finally disposed of in a manner that affirms the Final Order and Judgment," *id.* § 1.13. Thus, as in *Vaughn*, "the costs of delay are adequately captured by the settlement," 507 F.3d at 299.

In sum, almost the entire amount of the bond class counsel requests ($30,450 out of $32,000, *see* Mot. 25) consists of settlement-administration or delay expenses that are not defined by statute or rule as costs and are therefore not permissible components of an appeal bond under *Azizian*. There is no authority for requiring a bond for these expenses.

B. The Schachter objector-appellants may not be taxed for costs that class counsel incurs responding to other objectors' appeals.

The Schachter objector-appellants have indicated in filings with this Court and with the Ninth Circuit that they intend to raise a single issue on appeal: "whether the fact that the class action settlement in this case permits violations of seven state laws should have defeated settlement approval." Doc. 409-1.

Class counsel asks for a bond to cover transcript costs, but none of these costs are relevant to the Schachter objector-appellants' appeal, because as these appellants have noted in their transcript-related certifications, Docs. 409-1, 418-1, they raise a pure issue of law that can be decided based solely on the documents in the record.

If class counsel incurs transcript costs in responding to *other* objectors' appeals, those costs cannot be taxed against the Schachter objector-appellants. Among the costs taxable on appeal is the cost of "the reporter's transcript, if needed to determine the appeal." Fed. R. App. P. 39(e)(2). Because the transcripts are not "needed to determine the appeal" that the Schachter objector-appellants have brought, these appellants cannot be taxed for these transcript costs.

* * *

Accordingly, because class counsel has not identified any costs that would be taxable against the Schachter objector-appellants if they do not prevail on appeal, counsel has offered no basis for imposition of a bond on these objectors. The Court should deny the bond motion as to the Schachter objector-appellants for this reason alone.

II. Forcing Each Objector-Appellant To Post A Bond For The Entire Amount Of The Alleged Costs Is Improper Because It Secures Far More Money Than Appellees Could Recover As Costs.

Class counsel's requested bond would go far beyond the purpose of an appeal bond, which (as noted) is to ensure that an appellee is able to recover costs to which the appellee is entitled by rule or statute. Fed. R. App. P. 7. Instead of dividing class counsel's anticipated costs among all of the appellants and seeking a bond against each appellant for the appellant's share of the alleged costs, class counsel asks for a bond in the amount of all the alleged costs against *each*

appellant (and one individual who is not an appellant, *see infra* Part IV). The resulting request for bonds totaling $480,000 from the Schachter objector-appellants and others is *15 times* the amount class counsel claims would be taxable on appeal. Class counsel cites no authority justifying this extraordinary multiplier, and at least one court in this circuit has rejected such an approach when plaintiffs only sought to secure four times their anticipated costs and to impose the bond on groups of appellants rather than each individual. *See Toyota Motor Corp.*, 2013 WL 5775118, at *2 ("[T]he Court agrees that it would be improper to impose a bond upon *each* of four groups of the Appellants. Collectively . . . Plaintiffs seek bonds to cover their briefing costs four times over. This is clearly improper under the plain language of the Rule, which permits imposition of a bond in an amount limited to that 'necessary to ensure payment of costs on appeal.'" (quoting Federal Rule of Appellate Procedure 7; other citations omitted)).

A multiplier is particularly inappropriate here because the appeals have been consolidated and so class counsel will file only one complete set of appellate filings — not one for each group of separately-represented objector-appellants, and certainly not one for each individual objector-appellant.

Additionally, because the amount of the requested bond is so much greater than even the costs class counsels alleges the appellees could recover if they were to prevail, there is reason to question whether the motion to require such a large appeal bond from each objector is aimed at securing costs or deterring objectors from pursuing their appeals. *See infra* Part V.

III. A Bond Against The Schachter Objector-Appellants Is Unjustified In Any Amount.

The few cases in this district discussing appeal bonds look to three factors when considering whether to impose a bond: "(1) appellant's financial ability to post bond; (2) the risk that appellant would not pay the costs if the appeal loses; and (3) an assessment of the likelihood that appellant will lose the appeal and be subject to costs." *Schulken*, 2013 WL 1345716, at *4; *accord Fleury*, 2008 WL 4680033, at *7.

Regarding ability to pay, $32,000 appeal bond is an entirely different order of magnitude than the $500 filing fee that class counsel cites as the relevant benchmark. *See* Mot. 7-8. Inferring ability to pay the former from the payment of the latter is a non sequitur. Class counsel

asks this Court to consider, in evaluating ability to pay, "[a]n objector's habit of incessantly filing frivolous appeals," Mot. 7, but class counsel's discussion refers entirely to objectors and counsel *other than* the Schachter objector-appellants and their counsel, Public Citizen Litigation Group. In fact, the Schachter objector-appellants' counsel, Public Citizen Litigation Group, is a non-profit law firm that handles cases pro bono, so the Schachter objector-appellants are not even paying their lawyers. Moreover, class counsel has identified no prior appeal brought by any of the Schachter objector-appellants, and although Public Citizen Litigation Group has handled other appeals on behalf of objectors, no court has ever suggested that any of the appeals were frivolous, and class counsel identifies no such appeal.

For the second factor, difficulty of collection, class counsel relies on several district court decisions declaring, with little or no analysis, that collecting costs from out-of-state appellants is difficult. *See* Mot. 8-10 (citing *In re Initial Pub. Offering Sec. Litig.*, 728 F. Supp. 2d at 293; *In re Netflix Privacy Litig.*, 2013 WL 6173772, at *3; *Schulken*, 2013 WL 1345716, at *5; *Embry*, 2012 WL 2055030, at *2; *Fleury*, 2008 WL 4680033, at *7). Respectfully, these conclusory statements in non-binding decisions should not persuade this Court. First, it is incorrect that collecting costs against an out-of-state party is burdensome. Here, in particular, each of the non-Californians among the Schachter objector-appellants lives in a state — New York, Tennessee, or Virginia — that has enacted the Uniform Enforcement of Foreign Judgments Act, under which domesticating an out-of-state judgment is a simple administrative matter of filing in a local court a copy of the judgment along with the debtor's address (available from the Schachter objector-appellants' affidavits). *See* N.Y. C.P.L.R. §§ 5401-08; Tenn. Code. §§ 26-6-101 to -108; Va. Code §§ 8.01-465.1 to -465.5. Second, the argument equating out-of-state residency with collection difficulty proves too much by suggesting that every out-of-state resident should face an appeal bond — an overly broad presumption that would place out-of-state litigants at a disadvantage in federal appeals, despite the constitutional design of making the federal courts available for the purpose of *enhancing* fairness to non-residents. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74 (1938); *The Federalist* No. 80 (Hamilton). One of class counsel's own authorities demonstrates that there is a better approach than simply punishing out-of-state

litigants as a group: in *Schulken*, the court considered the individual circumstances of the appellant and relied on the appellant's history of non-payment of transcript fees rather than out-of-state residency alone. *See* 2013 WL 1345716, at *5. Following *Schulken*, and to avoid a presumption that disfavors out-of-state litigants, this Court should look for indications that particular appellants are unlikely to pay costs rather than considering only appellants' states of residence. Finally, some of the appellants in this case are from California, and class counsel offers no reason why he could not collect from them.

For the third factor, the merits of the appeal, class counsel assumes that a loss in this Court implies the total absence of any potential merit. *See* Mot. 10-14. That a few cases have imposed bonds after rejecting objections to settlement does not show that the Schachter objector-appellants' arguments *in this case* are so lacking in merit that a bond is appropriate because they are sure to lose. Again, class counsel's argument proves too much. If merely losing before a district court made an appeal bond appropriate, then appeal bonds would become the norm — sharply curtailing access to the appellate process and reducing the number of issues on which the appeal courts have the opportunity to provide legal guidance.

Respectfully, this Court's rejection of the Schachter objector-appellants' claim that the settlement violates seven state privacy laws is open to reasonable debate. As the Schachter objector-appellants will argue to the Ninth Circuit, the fact that one of the laws objectors accuse the settlement of violating (California Civil Code § 3344) is also one of the laws that plaintiffs sued defendants for violating in the case being settled, does not collapse the objection into a question about the lawsuit's underlying merits. A court has an independent obligation to satisfy itself as to the legality of the settlement. Moreover, the question whether this defendant is liable to these plaintiffs under these circumstances is analytically distinct from whether the settlement at issue violates the statute as a general matter. And the Court's focus on whether California law was violated in this instance undervalues the independent force of the laws of six other sovereign states — Florida, New York, Oklahoma, Tennessee, Virginia, and Wisconsin — which should reasonably expect that federal courts will not approve settlements that authorize or contemplate the violation of their laws. Finally, the Court's suggestion that the relevant state laws may be

preempted by the Child Online Protection and Privacy Act (COPPA) is incorrect, because the Supreme Court has made clear that Congress's decision not to regulate in a particular area (here, individuals between 13 and 18 years old) does not preempt states' ability to regulate in that area absent a specific showing (not made here) of congressional intent to do so. In fact, discussing the parental-consent laws upon which the Schachter objector-appellants rely, class counsel himself admits that "The laws of the other States are not preempted." Mot. 11. Thus, regardless of whether they succeed, the Schachter objector-appellants' arguments cannot be dismissed out of hand as entirely lacking in potential merit, and it would provide clarity regarding a district court's proper role at settlement and the preemptive scope of COPPA to have these issues addressed on appeal. The answers are by no means a forgone conclusion such that the Schachter objector-appellants should have to put up a bond just for the privilege of raising these questions.

Class counsel's attempt to cast aspersions on all objector-appellants' motives, *see* Mot. 2 ("Plaintiffs . . . ask the Court to impose an appeal bond upon objectors whose primary interest is their own compensation[.]"), is unsupported. The Schachter objector-appellants' only argument on appeal — that their children's privacy is being invaded in violation of their state-law rights — shows that the Schachter objector-appellants do not stand to come away from a successful appeal with any money. Class counsel's extensive discussion of *other* objectors' "Histories of Frivolous and Vexatious Litigation," Mot. 14-20, is wholly irrelevant to the merits of the Schachter objector-appellants' argument about their children's privacy. If any of the objections pursued on appeal turn out to be frivolous, the settling parties may make a Rule 38 motion against the appropriate parties before the court of appeals. *See Fleury*, 2008 WL 4680033, at *9 ("Settling Parties are not left without any recourse if the appeal is frivolous.").

In sum, setting aside class counsel's guilt-by-association arguments and unjustified insinuation about the motivations of the objectors, the gravamen of class counsel's theory is that whenever out-of-state objectors lose at the district court, they should have to pay a bond to appeal. This theory is untenably broad and would deny a large swath of litigants access to the appeals process. This Court should instead look to the specifics of this case: the Schachter objector-appellants should not be expected to pay $32,000 each just because they had to pay

(jointly) one appellate filing fee, do not present collection risks merely because they reside in other states, and are raising a potentially meritorious claim. An appeal bond is inappropriate.

IV. There Is No Justification For Imposing An Appeal Bond On An Objector Who Is Not Appealing.

Class counsel's request for a bond against objector Judy Reidel, who is not appealing, lacks any support in law or logic. A person who does not appeal cannot be taxed costs if the appeal is unsuccessful. Class counsel advances no reason to impose an appeal bond on a non-appellant and this Court should not do so.

V. The Court Should Not Permit The Use Of An Appeal Bond To Deter Legitimate Objectors From Seeking Appellate Review.

The magnitude of the requested bond, the attempt to impose the full amount of asserted costs on *each* objector-appellant (plus one objector who is not even appealing), and class counsel's guilt-by-association arguments and unfounded allegations about the motives of the Schachter objector-appellants, all suggest that the purpose of this motion may not be securing costs but intimidating objector-appellants from exercising their appellate rights. Whereas the Schachter objector-appellants stand to pocket no money as a result of this appeal, class counsel's fees are discounted by settlement expenses, *see* Doc. 360, at 7, so class counsel *does* have a financial incentive to discourage an appeal.

Not only should the bond motion be rejected on the merits for the reasons explained above, but this Court should reject the improper use of a Rule 7 bond to deter appeals: "Allowing districts court to impose high Rule 7 bonds where the appeals *might* be found frivolous risks impermissibly encumbering appellants' right to appeal[.]" *Azizian*, 499 F.3d at 961 (citation, internal quotation marks, and source's alteration marks omitted); *accord In re Am. President Lines, Inc.*, 779 F.2d 714, 718 (D.C. Cir. 1985) ("While, in the federal scheme, appeals found to be frivolous cannot command judicial respect, those possessing merit are normally a matter of right. Courts accordingly must be wary of orders, even those well-meaning, that might impermissibly encumber that right." (footnotes omitted)); *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 341 (7th Cir. 1974) ("[A]ny attempt by a court at preventing an appeal is unwarranted

and cannot be tolerated."); *see also Vaughn*, 507 F.3d at 300 (cautioning that "imposing too great a burden on an objector's right to appeal may discourage meritorious appeals or tend to insulate a district court's judgment in approving a class settlement from appellate review" (footnote omitted)).

The availability of an appeal is particularly important for class action objectors, who play a crucial role in the settlement process by speaking for absent class members and ensuring adversarial presentation of issues. "Objectors provide a critically valuable service of providing knowledge from a different point of view [from that of the settling parties.]" *Lane v. Facebook, Inc.*, 696 F.3d 811, 830 (9th Cir. 2012) (Kleinfield, J., dissenting); *see also Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 288 (7th Cir. 2002) (Posner, J.) ("It is desirable to have as broad a range of participants in the fairness hearing as possible because of the risk of collusion over attorneys' fees and the terms of settlement generally."); *Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1310 (3d Cir. 1993) ("In seeking court approval of their settlement proposal, plaintiffs' attorneys' and defendants' interests coalesce and mutual interest may result in mutual indulgence. The parties can be expected to spotlight the proposal's strengths and slight its defects. In such circumstances, objectors play an important role by giving courts access to information on the settlement's merits." (citation omitted)); *In re Cardinal Health, Inc. Sec. Litig.*, 550 F. Supp. 2d 751, 753 (S.D. Ohio 2008) ("It is undisputed that some objectors add value to the class-action settlement process by: (1) transforming the fairness hearing into a truly adversarial proceeding; (2) supplying the Court with both precedent and argument to gauge the reasonableness of the settlement and lead counsel's fee request; and (3) preventing collusion between lead plaintiff and defendants."); *In re UnitedHealth Grp. Inc. PSLRA Litig.*, 643 F. Supp. 2d 1107, 1109 (D. Minn. 2009) (same); *see also In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 298 (3d Cir. 1998) (noting that objections had led to several "enhancements" to a proposed settlement); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 359 (N.D. Ga. 1993) ("The Court finds that the efforts on behalf of objectors . . . assisted the Court in thoroughly examining the settlement. These objectors significantly refined the issues germane to a consideration of the fairness of this complex settlement and their

participation transformed the settlement hearing into a truly adversarial proceeding . . . and performed a valuable service for the class, even though their objections did not prevail.").

"As an outsider — someone without a stake in the attorneys' fee award — the objector provides an unbiased view of the settlement to a court that will otherwise see only a smooth presentation by the defendants' attorneys and class counsel claiming that the settlement is fair and reasonable and the product of hard-fought negotiations." Robert B. Gerard & Scott A. Johnson, *The Role of the Objector in Class Action Settlements — A Case Study of the General Motors Truck "Side Saddle" Fuel Tank Litigation*, 31 Loy. L.A. L. Rev. 409, 417 (1998). Indeed, Chief Judge Kozinski himself recently filed an objection to a class-action settlement. *See* Opp'n to Pls.' Mot. for Final Approval of Class Action Settlement, Dkt. 71, *Klee v. Nissan N. Am., Inc.*, No. 2:12-cv-08238 (C.D. Cal.), *at* http://www.abajournal.com/files/Kozinski.pdf.

The role of the class action objector is no less important on appeal. *See Crawford v. Equifax Payment Servs., Inc.*, 201 F.3d 877, 881 (7th Cir. 2000) (Easterbrook, J.) (noting that "appellate correction of a district court's errors is a benefit to the class" and that providing objectors the opportunity to appeal "is vital"). Some of the Supreme Court's most important guidance on Rule 23 resulted from a decision in which class action objectors successfully appealed. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 608, 612 (1997). In fact, the very legitimacy of binding absent class members through a class action settlement depends on their opportunity to participate fully in the settlement, including by appealing it:

> [N]onnamed class members are parties to the proceedings in the sense of being bound by the settlement. It is this feature of class action litigation that requires that class members be allowed to appeal the approval of a settlement when they have objected at the fairness hearing. To hold otherwise would deprive nonnamed class members of the power to preserve their own interests in a settlement that will ultimately bind them, despite their expressed objections before the trial court.

Devlin v. Scardelletti, 536 U.S. 1, 10 (2002). Thus, absent a showing that objectors' appeal is taken in bad faith or is wholly lacking in potential merit (not just that it "*might* be found frivolous," *Azizian*, 499 F.3d at 961) — a showing that class counsel has not even attempted to make regarding the Schachter objector-appellants — exorbitant appeal bonds should not be used to deter objectors' continued participation in litigation over class action settlements. Here, the

Schachter objector-appellants are raising a serious question of law about the legality of the settlement in light of seven state laws protecting minors' privacy. Whether or not their position is ultimately accepted by the court of appeals, the adversarial presentation of issues and appellate review facilitate the development and clarification of the law and, ultimately, fairer outcomes.

Beyond the class action context, the breadth of class counsel's arguments, if adopted by this Court, would pave the way for appeal bonds to become the norm when out-of-state litigants lose — a trend that would inevitably lead to fewer appeals and the diminution of access to justice, particularly for the impecunious. "[T]here can be no equal justice where the kind of an appeal a man enjoys depends on the amount of money he has." *Douglas v. California*, 372 U.S. 353, 355 (1963) (citation and internal quotation marks omitted); *see also Lecates v. Justice of Peace Court No. 4*, 637 F.2d 898, 899-900, 907-08 (3d Cir. 1980) (in two-tier court system, in which action could be heard by a justice of the peace but losing party normally would have the option to seek de novo superior court trial as of right, losing party's access to superior court in civil debt action could not be conditioned on the posting of a surety bond).

The use of appeal bonds to chill the pursuit of legitimate, good-faith appeals is a practice that this Court should emphatically discourage.

CONCLUSION

The motion to impose an appeal bond should be denied.

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Respectfully submitted,

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